



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT IV

December 10, 2020

To:

Hon. Nicholas McNamara
Circuit Court Judge
Dane County Courthouse, Branch 5
215 S. Hamilton St.
Madison, WI 53703

Carlo Esqueda
Clerk of Circuit Court
Dane County Courthouse
215 S. Hamilton St., Rm. 1000
Madison, WI 53703

Philip J. Brehm
23 W. Milwaukee St., Ste. 200
Janesville, WI 53548

Rachel Eleanor Sattler
Assistant District Attorney
215 S. Hamilton, Rm. 3000
Madison, WI 53703

Criminal Appeals Unit
Department of Justice
P.O. Box 7857
Madison, WI 53707-7857

Joshua W. Russell 645827
Green Bay Correctional Inst.
P.O. Box 19033
Green Bay, WI 54307-9033

You are hereby notified that the Court has entered the following opinion and order:

2018AP2429-CRNM State of Wisconsin v. Joshua W. Russell (L.C. # 2015CF1435)

Before Fitzpatrick, P.J., Blanchard, and Kloppenburg, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Attorney Philip Brehm, appointed counsel for Joshua Russell, filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2017-18)¹ and *Anders v. California*, 386 U.S. 738 (1967). Counsel provided Russell with a copy of the report, and both counsel and this court advised him

¹ All references to the Wisconsin Statutes are to the (2017-18) version unless otherwise noted.

of his right to file a response. Russell has not responded. We conclude that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. After our independent review of the record, we conclude there is no arguable merit to any issue that could be raised on appeal.

After a jury trial, Russell was convicted of four counts of second-degree sexual assault, two counts of suffocation or strangulation, and one count of false imprisonment, all arising from the same incident. The circuit court imposed concurrent sentences, with the controlling sentences being for twenty years of initial confinement and ten years of extended supervision. On one of the sexual assault counts, the court withheld sentence and placed Russell on probation for five years consecutive to the other sentences.

The no-merit report first addresses whether the evidence was sufficient to support the verdicts. We affirm the verdicts unless the evidence, viewed most favorably to the State and the conviction, is so insufficient in probative value and force that no reasonable trier of fact could have found guilt beyond a reasonable doubt. *State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). Credibility of witnesses is for the trier of fact. *Id.* at 504.

Without attempting to detail the evidence here, the lengthy testimony of the victim supported the convictions. Her testimony was not inherently incredible and, if believed, was sufficient to satisfy all of the elements for each of the charges. There is no arguable merit to this issue.

The no-merit report addresses whether the circuit court erred by instructing the jury that it was to “search for the truth.” Although the court stated that it was not going to include that phrase in the instructions, it did so in reading the preliminary instruction and the closing

instruction, although the written closing instruction did not include that phrase. The no-merit report points out recent case law holding that this is a proper instruction. See *State v. Trammell*, 2019 WI 59, ¶¶51-59, 387 Wis. 2d 156, 928 N.W.2d 564. Accordingly, there is no arguable merit to this issue.

The no-merit report addresses whether the circuit court erred in denying Russell's postconviction motion for a new trial based on a claim of ineffective assistance of counsel. To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that such performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). We need not address both components of the analysis if defendant makes an inadequate showing on one. *Id.* at 697.

To demonstrate prejudice, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694. A reasonable probability is one sufficient to undermine confidence in the outcome. *Id.* We affirm the circuit court's findings of fact unless those are clearly erroneous, but the determination of deficient performance and prejudice are questions of law that we review without deference to the circuit court. *State v. Pitsch*, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985).

Russell's claim in his postconviction motion was that his trial counsel did not object to several questions the State asked the victim. In general, those questions followed a pattern in which the prosecutor repeatedly asked the victim whether she had made various statements to a detective on an earlier occasion, and then as a follow-up in each instance asked whether the earlier statement to the officer was in fact true. The circuit court held an evidentiary hearing and

concluded that trial counsel's performance was not deficient and, if it was, Russell was not prejudiced.

In the no-merit report, appellate counsel notes that Russell's trial counsel explained at the postconviction hearing why he did not object to the form of the questions. The report states: "Appellate counsel would have to concede that had the alleged objectionable questions been posited in proper form, the relevant evidence could have been presented, based on counsel's knowledge of the pretrial discovery."

The no-merit report does not include the pretrial discovery, and we are not aware of that material otherwise being in the record. Therefore, we are unable to form any conclusion based on that material. Furthermore, it is not clear why Russell's attorney would be trying to support the circuit court's decision in favor of the State by directing our attention to material outside the record that the State itself did not offer at the evidentiary hearing. The evidentiary record on the postconviction motion is closed now, and appellate counsel's assessment of the potential merit of an appeal should be confined to that record. If that record is insufficient to support the decision, counsel should so argue.

That said, we conclude that it would be frivolous to argue that the circuit court erred. Even if all the questions to the victim had been objected to and the answers not occurred, it would be frivolous to argue that our confidence in the outcome should be undermined. None of the answers purported to establish facts necessary to support the convictions. The convictions would remain supported by the remainder of the victim's testimony, the physical evidence, and evidence that Russell initially lied to police about having been with the victim that evening.

The no-merit report addresses whether the circuit court erroneously exercised its sentencing discretion. The standards for the circuit court and this court on sentencing issues are well established and need not be repeated here. *See State v. Gallion*, 2004 WI 42, ¶¶17-51, 270 Wis. 2d 535, 678 N.W.2d 197. In this case, the court considered appropriate factors, did not consider improper factors, and reached a reasonable result. There is no arguable merit to this issue.

The no-merit report addresses whether there would be arguable merit to a motion to modify Russell's sentence based on a new factor. The record does not contain any sign of a potential new factor and, therefore, based on this record, any such motion would be frivolous.

Our review of the record discloses no other potential issues for appeal.

Therefore,

IT IS ORDERED that the judgment of conviction and order denying postconviction relief are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Brehm is relieved of further representation of Russell in this matter. *See* WIS. STAT. RULE 809.32(3).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals